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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1980

NO. 80-6655

MARGARET B. WATERS,

Petitioner

versus

CONLEY HENDERSON, ET AL,

Respondents

MOTION TO DISMISS OR AFFIRM

Pursuant to Ruly 16 (1) (6) of the Rules of the Supreme Court of the United States, appellee moves the Court to dismiss the appeal herein for the reasons and on the grounds set forth in the Brief in Opposition to Petition for writ of certiorari.

Respectfully Submitted,

Charlie R. Johnson,
Attorney for Appellees

10/

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Respondents

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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The issue of whether the attorney acted improperly in continuing to represent respondents in a previous action fails to present a substantial federal question, is supported by adequate state law, and is res adjudicata.

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QUESTION PRESENTED

Whether petitioner's petition for writ of certiorari should be granted when the issue petitioner presents has been fully, finally and fairly litigated in a previous action instituted by petitioner against respondents.

STATEMENT OF CASE

This is a Petition for Certiorari from an order of the Supreme Court of Tennessee, sitting at Knoxville, Tennessee, denying Petitioner's application for permission to appeal on February 2, 1981, styled Fred Henderson, et al v. Margaret B. Waters. The facts underlying the Petition are as follows: The Petitioner herein filed an action as plaintiff in the early 1970's seeking to reobtain title to a piece of property in Sevier County which was previously conveyed away by petitioner and at the time of the action was owned by respondents. Sevier County Chancery #8099. Respondents at that time were represented by Earl W. Hendry, who later was appointed Chancellor of the 13th District of Tennessee. Respondents upon Mr. Hendry's appointment, then obtained other counsel to proceed with the litigation. Judgment was rendered in favor of respondents and against Petitioner in that action. Said judgement was appealed by Petitioner on the grounds respondents' attorney, who later was to become chancellor,

practiced law in his own court. In fact, the cause was heard by Chancellor William Newkirk, sitting by designation and interchange. The Court of Appeals for the Eastern Section of Tennessee at Knoxville upheld the judgment of the chancellor, specifically finding no impropriety in the representation of respondents' attorney. The Supreme Court of Tennessee also upheld the decision. Petitioner then filed for certiorari to the United States Supreme Court on the grounds respondents' attorney was "practicing law in his own court". Certiorari was denied. Waters v. Henderson, 94 S.Ct. 3062, 417 U.S. 938, 41 L. ed. 2d 661 (1974).

The present action which gives rise to this petition was filed by respondents on August 12, 1978, and sought to restrain petitioner from trespassing on respondent's property and filing documents which amounted to clouds on respondent's title. Sevier Chancery #10919. As a defense, Petitioner once again alleged the first action No. 8099, was void because respondent's attorney became chancellor after being retained by respon-

dents. Upon a full hearing of the matter, judgment was rendered for respondents, from which timely appeal was taken to the Court of Appeals, Eastern Section, by Petitioner. The Court of Appeals affirmed the judgement of Sevier County Chancery Court in favor of respondents, entered a decree making the injunction permanent, and denied a petition to rehear. The Appeals Court further questioned Petitioner's right to collaterally attack the first action without specifically deciding the issue. Petitioner then appealed to the Supreme Court of Tennessee, which denied the application and affirmed. Petitioner now seeks review in this Court.

REASON FOR DENYING THE WRIT

I

This Petition for Certiorari should be denied for the following reasons:

a.) there exists adequate state law grounds to support the decision below;

b.) the petition fails to present a substantial federal question.

c.) the matter upon which the petition is submitted is res adjudicata.

The Chancery Court of Sevier County, Tennessee, the Court of Appeals, Eastern Section of Tennessee and the Supreme Court of Tennessee have collectively considered petitioner's contention herein and found the argument to be lacking in merit. This Court denied a petitioner's earlier petition for certiorari on this precise issue. Waters v. Henderson 94 S.Ct. 3062, 417 U.S. 938, 41 L.Ed 2d 661 (1974). The basis upon which all courts have denied petitioner's contention has been the existence of a Tennessee statute, Tenn. Code Anno. 17-1-105,

which specifically allows a chancellor to "wind down" his practice after being appointed to the bench, if the chancellor was retained prior to appointment. Specifically, no impropriety in the State proceedings was found by any court which has considered the question. Respondent wishes to emphasize that this question has been reviewed twice by all Tennessee trial and appellate courts, and once before by this Court. The Tennessee statute has been found to apply specifically to the present action, and to allow the representation which o urred here. It is therefore respectfully submitted by respondents herein that there exists adequate grounds of state law on which to uphold the decision below, and that the present petition fails to present a substantial federal question.

More important is the fact that the issue petitioner now takes to raise is res adjudicata. The matters on which petitioner bases this petition, and on which the prospective amici base their motion, were tried previously and adjudicated

fully in action entitled Waters v. Henderson, No. 8099 in the Chancery Court of Sevier County, No 51 Sevier Chancery in the Court of Appeals of Tennessee, Eastern Section, and No. 51 in the Supreme Court of Tennessee. A final and valid judgment was duly made and entered in such action adverse to petitioner herein and in favor of respondent herein. The opposing litigants in such prior action were the identical persons who are the parties to the instant action, and the matters litigated in the prior action were the same matters at issue in the present petition. The judgment in the prior action remains in full force and effect.

Respondent therefore respectfully submits that the issue raised in this petition and in the motion of prospective amici is res adjudicata and cannot be again litigated in this subsequent action between these same parties. Angel v. Bullington, 330 US 183, 91 L. Ed 832, 67 Sct. 657. The litigation between the parties has already spanned one decade, and need not be protracted further.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petitioners petition for a writ of certiorari and prospective amici's motion to leave to file a brief in this matter both be denied.

Respectfully submitted,

Charlie R. Johnson

Charlie R. Johnson,
Attorney for Respondents

R. B. Hailey

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed, sufficient U. S. postage prepaid, to Margaret B. Waters, P. O. Box 2173, Nogales, Arizona, 85621 and Susan L. Kay and L. Harold Levinson, Vanderbilt School of Law, Nashville, Tennessee, 37240 on this the 6th day of August, 1981.

Charlie R. Johnson

Charlie R. Johnson, Attorney

R. B. Hailey, Attorney